Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

ORDER OF FRIARS MINOR,

Petitioner,

v.

EMIL ALPERIN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in refusing to apply the political question doctrine of *Baker v. Carr*, 369 U.S. 186 (1962), to a class action claim seeking damages for undetermined property losses against the Order of Friars Minor ("OFM") arising from OFM's alleged assistance to a Nazi puppet regime in allegedly transferring property looted during World War II?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner (a defendant-appellee in the court of appeals) is Order of Friars Minor (erroneously sued as "The Franciscan Order (OFM), Including Croation Franciscans; Croation Cofraternity of the College of San Girolamo Degli Illirici").

The respondents (plaintiffs-appellants in the court of appeals) are Emil Alperin, Jewgenija Romanova, Maria Dankewitsch, Vladimir Morgunov, on behalf of themselves and all other persons similarly situated; Organization of Ukrainian Antifascist Resistance Fighters, Ukrainian Union of Nazi Victims and Prisoners, Vladimir Brodich, William Dorich, Igor Najfeld, on behalf of themselves and all other persons similarly situated; Lizabeth Lalich, Mladen Djuricich, Robert Predrag Gakovich, Nevenka Vukasovic Malinowski, Eli Rotem, Milorad Skoric, Veljko Miljus, Fred Zlatko Harris, Milja Conger, Allen Dolfi Herskovich, Bogdan Kljaic, David Levy, Zdenka Baum Ruchwarger, Vladan Celebonovic, Desa Tomasevic Wakeman, Daniel Pyevich, Koviljka Popovic, Jasenovac Research Institute, The International Union of Former Juvenile Prisoners of Fascism of Ukraine, Russia, and Belarus, on behalf of themselves and all others similarly situated.

The remaining party (a defendant-appellee in the court of appeals) is Istituto per le Opere di Religione (erroneously sued as the "Vatican Bank"), and is expected to file a separate petition for certiorari.

The Order of Friars Minor is an independent juridical entity organized under Italian law. It has no corporate parent and no publicly held company owns stock in it.

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I. The Ninth Circuit's opinion failed to properly distinguish between the OFM and the Vatican Bank in addressing the applicability of the political question doctrine. 10

II. Plaintiff's claims against OFM present non-justiciable political questions under all six formulations set forth in *Baker v. Carr*. 14

A. Resolution of Holocaust-era claims involving confiscation of property is an issue of foreign relations, constitutionally committed to the political branches of government. 14

B. The nature of the plaintiffs' claims against OFM is such that judicially discoverable and manageable standards do not exist, the claims cannot be resolved without an initial policy determination of a kind clearly for non-judicial discretion, and adjudication would express a lack of respect due the political branches of government. 18

C. The Court must adhere to political decisions already made because to do otherwise risks potential embarrassment to the political branches of the United States government. 22

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OPINIONS BELOW

The amended opinion and amended concurrence/dissent of the court of appeals (Appendix ("App.") at 1-72) is reported at 410 F.3d 532. The opinion of the district court (App. 73-91) is reported at 242 F.Supp.2d 686.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2005. The court of appeals denied rehearing, but filed an amended opinion with an amended partial concurrence and partial dissent on June 9, 2005 (App. 92-93). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

From the end of World War II to the present day, the United States has been steadily involved in diplomatic efforts to resolve claims involving gold and other valuables looted from the victims of the Nazis and their allies. Shortly after the war, the U.S. entered into executive agreements and treaties with several nations, including Germany, Yugoslavia and Italy, to achieve a comprehensive resolution of Holocaust-era claims for both reparations and restitution. The premise of those treaties and agreements was that all such claims should be resolved under the terms of international agreements.

Toward the close of the last century, the U.S. also entered into similar agreements with Germany, Austria, Switzerland, and France, and continues to pursue comparable agreements with other countries. *See American Insurance Ass'n v. Garamendi* ("*Garamendi*"), 539 U.S.

396, 408 (2003). These recent negotiations and the government-to-government agreements that they are producing, like the treaties and agreements made immediately after the war, seek to secure the private interests in restitution of Nazi war crime victims and to vindicate those injured by the acts of enemy corporations in wartime.

After the issuance of a June 1998 U.S. interagency report on the history of Holocaust-related assets,[1] and apparently dissatisfied with the pace of U.S. diplomatic action, plaintiffs initiated this action. The thrust of plaintiffs' suit is that the Order of Friars Minor ("OFM"), a Franciscan religious order organized under Italian law, allegedly conspired with the Vatican Bank to facilitate the transfer of gold and other valuables looted by the Croatian Ustasha political regime, which was supported throughout the war by Nazi forces, to Ustashi war criminals who fled to Italy in the war's aftermath (Doc. #65).

Factually, the complaint closely tracks the Eizenstat Report (*see* Doc. #65, ¶¶ 4, 57). The named plaintiffs are twenty-four individuals and four organizations who assert claims on behalf of a putative class estimated at 300,000 people worldwide (Doc. #65, ¶¶ 1, 2, 9-36, 62-63). Their third amended complaint is in five counts for conversion, unjust enrichment, restitution, an accounting, and human rights violations. The complaint theorizes that a brotherhood of Croatian priests living just outside the walls of the Vatican safeguarded the valuables removed from Croatia

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[1] See Supplement to Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany during World War II, U.S. Dept. of State (June 1998) ("Eizenstat Report"). The Eizenstat Report is Exhibit C to document item number 100 ("Doc. #100") of the record on appeal.

by the fleeing Ustashi. According to plaintiffs, OFM allegedly used the loot to establish and operate a so-called "ratline" that enabled Ustashi war criminals to escape from Europe to South America (Doc. #65, ¶¶ 55-57).

A. United States Foreign Policy on Holocaust-Era Claims.

The recovery of assets looted by the Nazi regime and its allies has been the subject of extensive international negotiations and agreements. In January 1946, the United States and seventeen other nations met in Paris to decide upon the method of distributing war reparations. The Paris conference culminated in the Paris Reparations Treaty, which provided that each signatory nation would receive a percentage of the total reparations the Western Powers collected based on their war-related damages and contribution to the Allied war effort (Doc. #89, Exh. A, Part I, Art. 1).

Pursuant to the Paris Reparations Treaty, each signatory nation's share of assets collected from Germany was supposed to satisfy any and all claims held by a nation, or its nationals, against Germany and its agencies:

> The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war.

(*Id.* at Part I, Art. 2.A). All acts of German satellite governments, including the one in Croatia, were considered to be acts of Germany itself. *See U.S. v. List*, Trials of War Criminals, Vol. XI, Case 7 at 1302-03 (1948).

Yugoslavia was a signatory to the Paris Reparations Treaty. Significantly, Article 6.E of the treaty provided that German "assets" included "assets which are in reality German assets, despite the fact that the nominal owner of such assets is not a German enemy" (*Id.*). This portion of the Paris Treaty also stated:

> Each Signatory Government shall enact legislation or take other appropriate steps, if it has not already done so, to render null and void all transfers made, after the occupation of its territory or entry into the war, for the fraudulent purpose of cloaking German enemy interests, and thus saving them harmless from the effect of control measures regarding German enemy interests.

(*Id.*)

One year later, in 1947, the United States and nineteen other nations, including Yugoslavia, the U.S.S.R., and the Uk.S.S.R., entered into the Treaty of Peace with Italy (Doc. #89, Exh. B). This treaty contained the following provisions on restitution:

> Section II—Restitution by Italy
>
> Article 75
>
> 1. Italy . . . shall return, in the shortest time possible, property removed from the territory of any of the United Nations.
>
> 2. The obligation to make restitution applies to all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession.
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> * * * *